Questions Presented

1. May final judgment in a local condemnation proceeding, prosecuted with due regularity, be collaterally challenged on newly raised grounds in an independent action brought by owners of one of the acquired damage parcels who did not oppose the application for condemnation, who did not appeal from the judgment, and who accepted a partial payment of the award?

2. Is the taking illegal or arbitrary because it works a hardship on the petitioners who must relocate or discontinue the business enterprise they conduct on the damage parcel taken in an eminent domain proceeding?

3. Is a taking by eminent domain invalid by reason of the United Nations' Declaration of Human Rights simply because it works a hardship on the owner of the property taken?

The District Court Action

The petition for certiorari describes this as an action to remove a condemnation proceeding in the state court to the United States District Court, pursuant to 28 U.S.C. Sec. 1441 (Pet., pp. 1-2).

Actually, as the face of the complaint shows, this is an action to nullify an order of condemnation made by the Supreme Court of the State of New York on the ground that the eminent domain provision of the New York constitution (Art. I, Sec. 7) and the New York Condemnation

Law, Section 4, are repugnant to the federal constitution, the United Nations Charter and the Charter of the Organization of American States. As ancillary relief, the complaint prays that all proceedings in the state court be stayed and that the condemnation proceeding be removed to the District Court (11-12).*

The State Condemnation Proceeding

The petitioners owned in partnership a parcel of real estate in the Borough of Manhattan where they conduct a business for the sale of automotive tires and related products (7-8, 13). The property, designated as Damage Parcel 7, was condemned as part of the site for the Lincoln-Amsterdam Urban Renewal Project, a federally-aided acquisition (7).

Local condemnation practice is governed by the City's Consolidated Condemnation Procedure (New York City Administrative Code, Chap. 15, Tit. B [2 Williams 1963 Ed. pp. 297 *et seq.*]. The statute provides, in part, for the vesting of title in the condemnor upon application made on notice; the filing of claims for damage; a trial of the damage claims; a hearing of objections on a tentative decree; the making and filing of a final decree; and a right to appeal from the final decree.**

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* Unless otherwise stated, parenthetical references indicate pages of the appendix in the Court of Appeals.

** The petitioners seem to be unaware of the governing statute. The complaint challenges the Condemnation Law of the State of New York, a general statute (12). The Condemnation Law exempts the City of New York from its operation (Sec. 27).

The complaint does not allege that any of the required statutory procedures were not performed. So far as it refers to the prosecution of the condemnation proceeding, it indicates that the City's application to condemn was granted on May 1, 1967, and thereafter the Condemnation Court made a fee award of $514,000 for petitioners' damage parcel (par. 9, p. 7; par. 13, p. 8).

The City's brief in the Court of Appeals invited the Court to take judicial notice of the following other uncontroverted and material details of the condemnation proceeding. See *Consolidated Freightways* v. *Railroad Commission of California*, 36 F. Supp. 269, 271 [D.C., Calif., 1941]). The order of condemnation, as appears from its own recital, was granted without opposition (reported without detail. *In Re Lincoln-Amsterdam Urban Renewal Project*, N.Y.L.J.,* May 3, 1967, p. 20, col. 4 [Sup. Ct., N.Y. Co.]). The award to the petitioners was granted by a final decree made and entered on December 10, 1969, after a trial and a hearing of objections on the tentative decree. The Condemnation Court overruled all objections to the awards (N.Y.L.J., July 2, 1969, p. 12, col. 8; Nov. 7, 1969, p. 15, col. 5; Dec. 15, 1969, p. 14, col. 3). The preliminary recitals show compliance with all statutory requirements, from the granting of the order of condemnation to the overruling of objections to the awards. The petitioners did not appeal from the final decree.

When this action was commenced in the District Court, the Comptroller of the City of New York had not reached the petitioners' award for processing of payment. An ad-

* New York Law Journal.

vance partial payment of award, in the amount of $325,000, however, had been collected by the petitioners (9).

Pending the physical commencement of the urban renewal project, the petitioners were permitted to remain in possession of their former property as tenants at will of the project sponsor. This action was precipitated by the City's efforts, on behalf of the sponsor, to dispossess the petitioners. To this end the Condemnation Court granted an order of possession, in the nature of a writ of assistance, directing the Sheriff of the County of New York to deliver possession of the premises to the sponsor (Pet., pp. 3-4).

Execution of the order of possession has been successively deferred by agreement of the parties or order of the Condemnation Court. On June 1, 1970 the Condemnation Court granted a final stay of execution, peremptory against petitioners, until July 1, 1970. An appeal from that order taken by petitioner Jack Liben to the Appellate Division, First Department, of the Supreme Court of the State of New York on June 26, 1970, is now pending. Also pending is his motion to that Court, returnable August 21, 1970, for a stay of the order of possession pending prosecution and decision of that appeal and a companion appeal described in the following paragraph.

The companion appeal to the New York Appellate Division, First Department, was taken by petitioner Jack Liben on June 26, 1970, from an order of the Condemnation Court entered June 24, 1970. That order denied petitioner's application for the vacatur of the order by which petitioner's property was taken in condemnation.

POINT I

The issue having been determined by the final decree in the condemnation proceeding in the Supreme Court of the State of New York, petitioners, who failed to appeal therefrom, are estopped from challenging the validity of the appropriation of their property. They are estopped also by receipt of a partial payment of award, which constitutes an acceptance of benefits in the challenged proceeding.

(1)

The theory of the complaint in this action is that the appropriation of petitioners' property violated their rights, protected by the Constitution of the United States and certain of its treaties with international organizations. This issue could have been urged in the condemnation proceeding in the state court, but it was never raised there.

The application to condemn was made on notice published in the City Record, a published journal of the City of New York. It was supplemented by mailed notice to property owners, directed to addresses registered with the City Collector for the purpose of tax billing. New York City Charter, Sec. 382; Administrative Code, Sec. B15-7.0 (2 Williams 1963 Ed., p. 300). The petitioners did not oppose the application. Nor did they challenge the taking at any time before final judgment. On the contrary, represented by counsel, they participated in the valuation trial without protest against the validity of the appropriation, and they obtained a substantial award for their property.

This action seeks to litigate the very issue resolved by the order of condemnation, which order is recited in the

final decree of the Condemnation Court. The action is a collateral attack on the appropriation and is barred by the final decree. *Huling* v. *Kaw Valley Railway and Impr. Co.*, 130 U. S. 559, 564 (1889); 6 NICHOLS on *Eminent Domain* (Third Ed.), §26.72, pp. 409-411. This principle of estoppel by judgment is codified in the local condemnation statute, as follows (Administrative Code, §B15-24.0, subd. b [2 Williams 1963 Ed., p. 317]):

> "The final decree, unless set aside or reversed on appeal, shall be final and conclusive as well upon the city as upon the owners of the real property mentioned therein, and also upon all other persons whomsoever."

As noted, the petitioners did not appeal from the final decree. Ordinarily, the order of condemnation, itself not appealable, may be brought up for review on appeal from the final decree. *Matter of City of New York (Cohan-Bronx Terminal Market)*, 12 AD 2d 745 (1st Dept., 1961), lv. den. 9 NY 2d 612 (1961), cert. den. *sub nom. Cohan* v. *City of New York*, 366 U. S. 943 (1961); New York Civ. Prac. Law and Rules 5501, subd 1. In the premises, since the order of condemnation was granted without opposition, it would have been beyond the scope of review if an appeal had been taken from the final decree. *Matter of City of New York (Flatbush Ave. Extension)*, 167 App. Div. 908 (2nd Dept., 1915).

(2)

The vice of petitioners' collateral attack on the condemnation decree is particularly significant on this application for certiorari. If such maneuver is countenanced, they will have avoided the finality requirement of the

statute that limits this Court's review by certiorari of the judgment of a state court. 28 U.S.C. Sec. 1257.

Under local statute a decree in condemnation is appealable as of right to the Appellate Division of the New York Supreme Court. Administrative Code of the City of New York, Sec. B15-25.0 (2 Williams 1963 Ed., p. 317). As noted, petitioners failed to take such appeal, thereby waiving the right to apply to this Court for review of the proceedings in the state court.

Instead, on December 11, 1969, the day after the entry of the decree in condemnation, they filed their complaint in this action in the United States District Court (2). If their appeal in this collateral action is permitted to serve as a basis for a review by certiorari, petitioners will have accomplished by indirection that which they could not do directly.

It is noteworthy that one of the petitioners, Jack Liben, has been and still is seesawing between the federal and state court systems. After the United States Court of Appeals affirmed the order of the District Court on May 7, 1970, the petitioners did not immediately make the instant application. Instead, Jack Liben prosecuted unsuccessful motions in the Condemnation Court for a further stay of execution of the order of possession and for the vacatur of the order of condemnation, and then filed notices of appeal to the New York Appellate Division from the orders denying those motions (*ante*, p. 5).

Liben also made a motion in the Appellate Division, returnable August 21, 1970, for a further stay of the order of

possession and for an interim stay pending the decision of the motion. The latter application, heard in chambers on July 2, 1970, by Justice George Tilzer of the Appellate Division, was denied. Thereafter, on July 29, 1970, petitioners resumed proceedings in this action by service of the instant petition for certiorari.

Thus, at the present writing, one of the petitioners, a partner of the others, is litigating this controversy with the City in appellate courts of two judicial systems, having brought the matter before this Court in avoidance of the policy that permits review of the judgment of a state court only if it is final.

(3)

The petitioners received an advance partial payment of award in the amount of $325,000. This acceptance of benefits in the condemnation proceeding is a further bar to their attack on the acquisition. *In re Denney* v. *Fort Recovery Banking Co.*, 135 F. 2d 184, 186 (7th Cir., 1943), cert. den. 320 U. S. 747 (1943), rehear'g den., 320 U. S. 812; *Matter of City of New York* (*Court House*), 216 N.Y. 489, 494-495 (1916).

POINT II

The acquisition of the premises is not illegal or arbitrary because the petitioners must relocate or discontinue the business enterprise they conducted on the property. The United Nations' Declaration of Human Rights restates the due process requirement of the federal and state constitutions, which was observed in the challenged appropriation.

(1)

The core of petitioners' grievance is that, in view of the difficulty in finding a new place of business, they were arbitrarily deprived of their property in contravention of the Declaration of Human Rights (Pet., 4, 6).

The power of eminent domain is an inherent attribute of sovereignty. *Adirondack Railway* v. *New York State*, 176 U.S. 335, 349 (1899). The federal and state constitutions do not confer the power, but limit it by providing that property shall not be taken without due process of law or just compensation. These limitations are satisfied if the taking is for a public purpose and the property owner is afforded an appropriate hearing on the compensation issue before a properly constituted tribunal. *Roberts* v. *New York City*, 295 U.S. 264, 277-278 (1934).

Although the petitioners characterize the City's taking of their property as arbitrary, they make no challenge to the procedure of the taking or to the City's local condemnation statute. As noted, they mistakenly assume that the procedure is governed by a general statute, the Condemnation Law of the State of New York.

The sense of the petitioners' charge of arbitrary action is that their property should have been spared from condemnation because of difficulty in relocating their business. This is an argument that relates to the wisdom of including the property in the urban renewal site. That is a legislative matter, which is not justiciable. *Berman* v. *Parker*, 348 U.S. 26, 35 (1954). Every public acquisition works incidental hardship on owners of private property, residential as well as commercial. Relocation difficulties or loss of good will connected with the property owner's business are incidental to the appropriation and are not compensable. *Courtesy Sandwich Shop, Inc.* v. *Port of New York Authority*, 12 NY 2d 379, 391 (1963), app. dism. for want of a substantial federal question, 375 U.S. 78 (1963), rehear'g den. 375 U.S. 960 (1963). In recent years the burden of relocation has been eased by statutory allowances. 42 U. S. C. §1465(b).

The petitioners' reliance on Article 17, Section 2, of the United Nations' Declaration of Human Rights does not aid their case. It provides (Pet., p. 7):

> "No one shall be arbitrarily deprived of his property."

This restates domestic constitutional provisions that no person shall be deprived of property without due process of law.

The measure of the petitioners' misunderstanding of their rights is that they direct a constitutional challenge to Article I, Section 7, of the Constitution of the State of New York and Section 4 of its Condemnation Law. Their prayer for relief asks that these sections "be declared of

no effect" (12). The request is absurd. The former section which embodies the "just compensation" requirement, is a restatement of the Fifth Amendment of the federal constitution. The latter is a general statute, inapplicable to local condemnations (*ante*, fn., p. 3).

(2)

Petitioners' other contentions addressed to the merits are that the condemnation of their property serves the interest of local religious organizations and that funds are not available to redevelop the urban renewal site (Pet., p. 6).

The latter is a new argument, not pleaded in the complaint or urged in the court below. Respecting the former, the complaint alleges on "information and belief" that the premises were condemned at the behest of a Catholic priest and a rabbi concerned with housing facilities available for members of their congregations in the interest of maintaining a balanced community (10).

There is no indication, and petitioners do not allege, that aid to these particular congregations was the sole and exclusive purpose of the condemnation or that the apartments in the housing project, still to be erected, will be allocated on any denominational basis. At most, petitioners' allegation suggests that the condemning authority was motivated, in part, by the laudable considerations urged by two clergymen. In the circumstances, the issue of the ulterior motive of an acquisition, accomplished with due regularity, is not justiciable. See *Deerfield Park District* v. *Progress Development Corp.*, 26 Ill. 2d 296, 186 N.E. 2d 360, 361 (1962), cert. den. 372 U.S. 968 (1963).

CONCLUSION

The petition for a writ of certiorari should be denied.

August 17, 1970.

Respectfully submitted,

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